

STATE OF MICHIGAN
COURT OF APPEALS

SKY REACH, INC.,

Plaintiff-Appellee,

v

BLUE LINE ELECTRIC, INC., d/b/a BLUE LINE
GENERATOR SALES & SERVICE, INC., and
WYANDOTTE ELECTRIC SUPPLY
COMPANY, INC.,

Defendants-Appellees,

and

WAL-MART STORES, INC., WILLIS COROON,
AGREE LIMITED PARTNERSHIP, STANDARD
FEDERAL BANK, and R. MCCracken
CORPORATION,

Defendants,

and

THE LASALLE GROUP,

Defendant-Appellant,

and

DOUGLAS PHLETCHER,

Third-Party Defendant.

Before: White, P.J. and Zahra and Kelly, JJ.

PER CURIAM.

The LaSalle Group (“LaSalle”) appeals as of right and challenges a November 5, 2004, order granting summary disposition to Wyandotte Electric Supply Company, Inc. (“WES”),

UNPUBLISHED
November 21, 2006

No. 268546
Macomb Circuit Court
LC No. 2003-005461-CH

pursuant to MCR 2.116(C)(10) and denying LaSalle's motion for partial summary disposition. Subsequently, the court entered judgment against LaSalle and in favor of WES for \$63,766.60. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

This action arise from various contractors, subcontractors, and suppliers attempting to obtain payment for services and goods supplied in the construction of a Sam's Club store. This appeal only concerns Blue Line Electric, Inc. ("Blue Line"), a subcontractor, WES, a supplier to Blue Line, and LaSalle, the general contractor and obligor on a bond.

WES entered into a contract with Blue Line on approximately February 23, 1998, pursuant to which WES agreed to furnish materials to Blue Line on an open account. Beginning on approximately November 25, 2002, Blue Line ordered materials for the Sam's Club project. However, Blue Line also stopped making payments on its account in November 2002. On April 16, 2003, WES placed Blue Line on credit hold and suspended delivery. Shortly thereafter, WES filed a construction lien on the property. Blue Line arranged a meeting with LaSalle, which paid WES in exchange for WES discharging the lien. Blue Line agreed that it would limit its purchases from WES to the Sam's Club project. Blue Line and LaSalle agreed to provide WES additional security by using a joint check arrangement. In the first joint check agreement, Blue Line agreed that it would purchase materials from WES in an amount not to exceed \$20,000, but then Blue Line purchased materials in the amount of \$25,000. LaSalle wrote a check to WES and Blue Line for \$25,000. The not-to-exceed amount in the joint check agreement was modified from \$20,000 to \$45,000. The joint check agreement at issue here states, "NOT TO EXCEED AMOUNT: \$45,000" and states that this amount "includes the original Joint Check Agreement issued May 9, 2003 for \$20,000. Total material for the Project not to exceed \$45,000." It further provides, "Supplier retains any lien or bond claim rights available under the applicable law in the event of non-payment." Blue Line ordered materials that exceeded the amount of the joint check agreement and failed to pay. WES recorded a construction lien and sought foreclosure. While this litigation was pending, LaSalle took out a bond to replace the project property as security for the underlying debt. Pursuant to MCL 570.1116(1), the filing of a bond is grounds for vacating and discharging a claim of lien. However, the litigation continued with respect to the validity of WES's lien, because the parties evidently understood that the validity of the lien determined LaSalle's liability as obligor on the bond.

LaSalle filed a motion for partial summary disposition of WES's claim pursuant to MCR 2.116(C)(10) and argued that the claim of lien filed by WES was invalid as a result of the joint check agreement between WES, Blue Line, and LaSalle. LaSalle argued that because WES agreed to a \$45,000 limit, it could not recover on a lien for more than that amount. LaSalle also argued that by agreeing to the joint check agreement, WES waived its right to a claim of lien.

WES filed a response to LaSalle's motion and a counter-motion for summary disposition pursuant to MCR 2.116(C)(10). WES asserted that the "do not exceed" amount merely established the limit of LaSalle's obligation to issue joint checks; it did not establish the amount of the contract with Blue Line, or waive WES's rights to assert a lien, particularly when the agreement states that it preserved WES's right to a lien.

In response to WES's motion, LaSalle argued that the application for an open account upon which WES relied was not a valid basis for making LaSalle responsible for Blue Line's

debts. According to LaSalle, the only contract on which LaSalle could be responsible was the joint check agreement, but that agreement contained a specific limitation on LaSalle's responsibility. That contractual limit barred WES from recovering a greater amount through a lien. LaSalle maintained that WES waived its right to claim a lien in excess of \$45,000.

The trial court recognized that WES's claim of lien was discharged by virtue of the bond LaSalle obtained, but examined the validity of the lien in order to determine LaSalle's liability as obligor on the bond. In that regard, the court determined that the joint check agreement did not preclude WES's recovery, reasoning that "the Agreement set forth a limit with respect to which LaSalle had been obligated to submit joint checks. However, the language therein did not establish that [WES] waived its right to assert a construction lien regarding any materials it furnished that exceeded the \$45,000 limit." The court granted WES's motion and denied LaSalle's motion.

On appeal, LaSalle argues that the trial court erred in determining that WES could recover in excess of the limit set forth in the joint check agreement.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

LaSalle claims that the joint check agreement is the source of any liability it has to WES and that the \$45,000 limit is enforceable. LaSalle cites *Rowen & Blair Electric Co v Flushing Operating Corp*, 66 Mich App 480; 239 NW2d 633 (1976), aff'd 399 Mich 593 (1977), for the proposition that a party that agrees to a limit on a contract price is not entitled to a lien to recover funds in excess of the price.

In *Rowen & Blair Electric Co*, a corporation ("Dutch Treat") leased a building from the defendant. The lease included a provision for the defendant to pay \$45,000 in improvements to the premises, including an estimated \$10,000 for electrical work. Dutch Treat hired the plaintiff for electrical work. The plaintiff was not fully paid for its work and filed a lien against the property. It brought an action to foreclose the lien. The former statutes at issue in that case¹ allowed a lien only to the extent that it was predicated on a contract between the claimant and the owner, part owner, or lessee acting as the lessor's agent. *Sewell v Nu Markets, Inc*, 353 Mich 553, 558-559; 91 NW2d 861 (1958); *Rowen & Blair Electric Co*, *supra*, p 599-604. Therefore, a contract with Dutch Treat could create a valid lien only to the extent that Dutch Treat was acting within the scope of its agency with the owner (the defendant). The trial court held that the lien was valid against the defendant, but was limited to \$10,000, because that was the extent of the authority given to Dutch Treat for electrical repairs. This Court agreed that the defendant's lien liability was dependent on Dutch Treat's power to bind the defendant under agency principles, but concluded that the agency was limited to an expenditure of \$45,000.

¹ Former MCL 570.1 *et seq.*, the mechanic's lien act, was replaced by the construction lien act, MCL 570.1101 *et seq.*

Rowen & Blair Electric Co, supra, is not useful in resolving the present appeal. The limitation on the price of the improvements to which the lessor (the defendant) and the lessee (Dutch Treat) agreed was relevant because it affected the scope of the agency, and Dutch Treat's agency was critical to the lien. Under the construction lien act in effect now, a lien need not be based on a contract with the owner. MCL 570.1107(3). *Rowen & Blair Electric Co* recognizes a potential ground (lack of authority to bind the owner under agency principles) for invalidating a lien under the former statute. Considering that a lien under the current construction lien act does not depend on a contract with the owner and agency principles are not implicated in the present case, *Rowen & Blair Electric Co* is inapposite.

LaSalle correctly notes that MCL 570.1107(1) provides that a lien "shall not exceed the amount of the lien claimant's contract less payments made on the contract." LaSalle contends that the contract is the joint check agreement with its limit of \$45,000, of which only \$21,190.10 was remaining. According to LaSalle, a lien in excess of that amount was improper and invalidated the entire lien.

LaSalle's argument fails to distinguish between LaSalle's contractual obligation pursuant to the joint check agreement and the obligation LaSalle assumed when it obtained the bond in substitution for the property. LaSalle's obligation under the joint check agreement was limited to \$45,000, but that limitation does not restrict LaSalle's liability as obligor on the bond. We agree with WES that the contract on which the lien is premised is WES's contract with Blue Line, not the joint check agreement.

LaSalle next argues that WES waived its lien rights by agreeing to the limitation in the joint check agreement. However, this argument is without merit, inasmuch as the agreement states, "Supplier retains any lien or bond claim rights available under the applicable law in the event of non-payment."

LaSalle also contends that the trial court erred in granting WES's motion for summary disposition because no depositions had been taken to determine which materials were supplied for the Sam's Club Project, as opposed to other Blue Line projects.

In support of WES's motion for summary disposition, WES presented an affidavit attesting to \$59,237.07 due for the project as of May 25, 2004. LaSalle presented no evidence to contradict this amount.² LaSalle merely maintained that WES could not recover amounts in excess of the limitation in the joint check agreement. Because LaSalle failed to present evidence to the trial court showing that there was a genuine issue of material fact, the trial court properly granted summary disposition to WES.

² On appeal, LaSalle has presented an affidavit of its chief financial officer, Chester Jablonski, averring that he believed that WES's account stated is not accurate. However, that affidavit was not presented below and will not be considered on appeal. *Quinto v Cross & Peters Co*, 451 Mich 358, 366-367 n 5; 547 NW2d 314 (1996).

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly